Supreme Court, U.S.
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No. 96-1075

In The

Supreme Court of the United States

October Term, 1996

ERNST & YOUNG LLP,

Petitioner,

vs.

DOLLARD McGANN, et al., On Behalf Of Themselves And All Others Similarly Situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court grant certiorari to review the Ninth Circuit's unexceptional holding, that an auditor who issues a false audit opinion for inclusion in a securities issuer's Securities and Exchange Commission filings may be liable under §10(b) of the Securities Exchange Act of 1934 for committing a deceptive practice "in connection with the purchase or sale of any security"?

2. Should this Court grant certiorari to determine the interrelationship between §18 and §10(b) of The Securities Exchange Act of 1934, in a case in which plaintiffs have not pleaded §18 claims and the Ninth Circuit did not even find petitioners' legislative-history argument worthy of discussion?

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I. INTRODUCTION

The questions presented by Ernst & Young's petition for certiorari do not warrant this Court's attention.

Ernst & Young charges that the Ninth Circuit ignored statutory text in favor of "policy-driven" analysis, but the Court's opinion shows that it did precisely the opposite. Citing *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 114 S. Ct. 1439 (1994), as its model, the Ninth Circuit carefully reviewed §10(b)'s text to hold that Ernst & Young's conduct was "in connection with" the purchase or sale of securities. 9a-10a. The Court then considered the overall structure of the statute – finding that it too compelled the same conclusion. 10a-13a.

Only then did the Court consider policy, after acknowledging "the traditional rule that policy considerations 'override' the text and structure of a statute only where necessary to prevent 'bizarre' results that Congress obviously did not intend." 13a-14a. Policy analysis also confirmed the conclusions the Court already reached on the basis of statutory text and structure: "Congress's goals are better served *by giving the 'in connection with' language of §10(b) its natural meaning* and imposing liability on all whose false assertions are reasonably calculated to influence the investing public." 15a (emphasis added). Given the consistency of the text, the statutory structure and the policy considerations underlying them, it is not surprising that the Ninth Circuit's opinion on this issue of statutory construction comports with *every* reported precedent on the issue. Thus, Ernst & Young's central assertion, that the Ninth Circuit's decision conflicts with *Central Bank*, is patently false. The opinion

below does not conflict with or undermine *Central Bank*, or any other decision of this Court, and there is no split in the circuits, nor disagreement among the lower courts.

Moreover, Ernst & Young's petition is based entirely on a false factual premise: that Ernst & Young provided an audit opinion with no control over its use, and with no intention that it be used in any registration statements or other offering documents. In truth, Ernst & Young executed an *express written consent* to the use of its opinion in registration statements for securities offerings.

In apparent desperation, Ernst & Young also argues that this Court's review is required because the Ninth Circuit *did not address* certain of its arguments. For example, it contends this Court should review the legislative history of §18 of the Securities Exchange Act of 1934 ("Exchange Act"), to determine what "actual reliance" means – even though plaintiffs have not alleged a §18 claim, and the element of reliance for §10(b) claims is not at issue. This Court has better things to do than to consider new and irrelevant issues that were not considered or decided below.

In sum, there is no reason why this Court should review questions that are not properly presented or that were not reached by the Court below, in a case in which the decision below follows decades of precedent and produces no conflict with any decision of any court.

II. STATEMENT OF THE CASE

This case involves a massive securities fraud perpetrated by Community Psychiatric Centers ("CPC"), certain of its officers and directors, and its independent auditors, Ernst & Young. ER 1 (the Complaint). In a related action, other defendants, including CPC, settled the §10(b) claims against them for over $40 million in cash and securities. *See In re Community Psychiatric Centers*, No. SACV-91-533-AHS(EEx), Stipulation of Settlement, at 13 (C.D. Cal., filed Nov. 29, 1995).

The Complaint alleges that CPC overstated its financial results, and that Ernst & Young prepared an audit opinion that was knowingly or recklessly false for CPC to include in its 1990 Annual Report and SEC filing on Form 10-K. ER 1:¶¶3, 6, 10-11, 13, 19-55. SEC regulations required the audit opinion to be filed with CPC's Annual Report and Form 10-K, and Ernst & Young naturally anticipated that investors' use of it would affect the price of in CPC stock. *See* ER 1:¶¶13, 47-49, 52, 55.

The Form 10-K prominently featured Ernst & Young's audit opinion, which falsely represented both that its audit of CPC had been conducted in accordance with Generally Accepted Auditing Standards, and that CPC's financial statements were presented in accordance with Generally Accepted Accounting Principles. ER 1:¶¶14, 16-44. The Form 10-K was also incorporated by reference in registration statements for offerings of CPC securities – and it reproduced Ernst & Young's written and signed

consent allowing its false opinion to be included in the registration statements:[1]

> CONSENT OF INDEPENDENT AUDITORS
>
> We consent to the incorporation by reference in Registration Statement Number 2-76435 on Form S-8 dated March 11, 1982, as amended, and Number 33-14747 on Form S-3 dated August 6, 1987 of our report dated January 28, 1991 on the consolidated financial statements and financial statement schedules included in the annual report on Form 10-K of Community Psychiatric Centers for the year ended November 30, 1990.
>
> /s/
> ERNST & YOUNG

In the district court, after answering, and immediately following this Court's decision in *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 114 S. Ct. 1439 (1994), Ernst & Young moved for judgment on the pleadings, arguing that it could not be liable because "[p]laintiffs have not alleged that Ernst & Young participated in any purchase or sale of CPC stock."[2] Faced with a wall of precedent construing §10(b)'s "in connection with" text to reach defendants who did not personally engage in securities transactions, Ernst & Young argued that all such authorities had been implicitly overruled by *Central Bank*.

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[1] Community Psychiatric Centers Form 10-K for the fiscal year ended November 30, 1990, at p. 84.

[2] Memorandum of Points and Authorities in Support of Defendant Ernst & Young's Motion for Judgment on the Pleadings, at p. 15 (filed June 27, 1994).

Central Bank, of course, dealt with aiding-and-abetting liability under §10(b), not with the construction of §10(b)'s "in connection with" language for primary liability. 114 S. Ct. at 1453-54. Nonetheless, Ernst & Young contended that because *Central Bank* stated that policy considerations cannot "override" the text and structure of a statute, it voided all decisions that had so much as *considered* congressional policies *when construing §10(b)'s text*. The district court accepted Ernst & Young's argument and dismissed the case, concluding that it was not bound by Ninth Circuit precedents construing §10(b)'s "in connection with" language. 30a.

Plaintiffs appealed, urging the Ninth Circuit to apply §10(b)'s "in connection with" provision as written, and as interpreted by a line of cases dating from *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc), all holding that false or misleading statements are made "in connection with" securities trading "whenever [such] assertions are made . . . in a manner *reasonably calculated* to influence the investing public." 401 F.2d at 862 (emphasis added).

In its answering brief, Ernst & Young emphasized again that "[t]here is no allegation that Ernst & Young engaged in any securities transaction," Ernst & Young, 9th Cir. Answering Brief, at 7, and urged that *Texas Gulf* and its progeny were no longer good law. Ernst & Young also said that it "had given no consent to use of the opinion to sell securities." *Id.* at 18. Plaintiffs' reply brief pointed out, *inter alia*, that the Form 10-K *itself* contained Ernst & Young's "express consent to the inclusion of its audit opinion in two stock registration statements." Appellant's 9th Cir. Reply Brief, at 6 n.3.

The SEC filed an amicus curiae brief supporting plaintiffs and urging reversal, asking the Ninth Circuit to apply the same law that has been "uniformly followed by all other courts of appeals to address the issue." Brief of the Securities and Exchange Commission, Amicus Curiae, at 2. That standard, the SEC explained, is based "on a reading of the statutory language, on a comparison with other statutory provisions, and on legislative history, all of which is fully consistent with *Central Bank*." *Id.* at 3.

The Ninth Circuit reversed. Focusing on the text of the statute itself, the Court observed that "[o]n its face, this language does not limit liability to those who actually trade securities." 9a. "Instead §10(b) extends liability to all those who use a fraudulent device 'in connection with' the trading of securities." 9a. The Court held that "*Texas Gulf* strikes a reasonable balance, applying liability under §10(b) to those who make public statements reasonably calculated to influence those who trade securities, whether or not such persons actually trade securities." 9a.

The Ninth Circuit then considered the structure of the federal securities acts, and found support for the same conclusion. "[S]tructural analysis indicates that securities trading by the defendant is not a prerequisite to liability under §10(b)." 11a. Several other provisions of the securities statutes do make liability turn upon participation in a securities transaction – showing that " 'when Congress intended that there be a participation in a securities transaction as a prerequisite of a violation, it knew how to make that intention clear.' " 11a (quoting *Texas Gulf*, 401 F.2d at 860). "Thus, it would ignore the structure

of the federal securities laws to read an implied trading requirement into the text of §10(b)." 11a.

Finally, the Ninth Circuit held that policy considerations were consistent with this conclusion: "Congress's goals are better served *by giving the 'in connection with' language of §10(b) its natural meaning* and imposing liability on all whose false assertions are reasonably calculated to influence the investing public." 15a (emphasis added).

III. REASONS FOR DENYING THE WRIT

A. The Ninth Circuit's Interpretation Of §10(b) Presents No Question That Warrants This Court's Review

Ernst & Young identifies no conflict of any kind between the decision below and any decision of this or any other court. To the contrary, the Ninth Circuit's opinion comports with every reported precedent on construction of §10(b)'s "in connection with" requirement.

Ernst & Young contends review is warranted because the Ninth Circuit disregarded this Court's holding in *Central Bank*. But the Ninth Circuit's opinion shows that the Court followed *Central Bank*'s approach of analyzing statutory text and structure first, 9a-13a, and only then looked to policy concerns, which confirmed its conclusions. 13a-14a (citing *Central Bank*, 114 S. Ct. at 1453-54). The Court concluded that "Congress's goals are better served *by giving the 'in connection with' language of §10(b) its natural meaning* and imposing liability on all whose

false assertions are reasonably calculated to influence the investing public." 15a (emphasis added).

Ernst & Young may disagree with that conclusion, but that is hardly a reason for granting certiorari on an issue that has produced no controversy in the lower courts, in academic commentary or, for that matter, anywhere. As the Ninth Circuit observed in the opinion below, other circuits have joined it and the Second Circuit in "adop[ting] *Texas Gulf*'s interpretation of the 'in connection with' language of §10(b)."[3] Ernst & Young cannot identify a *single* precedent, from any court, that conflicts with the Ninth Circuit's holding that an accountant commits a deceptive practice "in connection with the purchase or sale of any security" by providing a false opinion for inclusion in an issuer's SEC filings. In fact, the recent decisions on the issue have consistently *rejected* Ernst & Young's contention that *Central Bank* protects accountants from liability for making false statements in

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[3] 7a (citing *Gottlieb v. Sandia American Corp.*, 452 F.2d 510, 516 (3d Cir. 1971); *Akin v. Q-L Inv., Inc.*, 959 F.2d 521, 528 (5th Cir. 1992); *Mitchell v. Texas Gulf Sulphur Co.*, 446 F.2d 90, 100-01 (10th Cir. 1971); *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1171 (D.C. Cir. 1978)); *see also Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 123 (2d Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 702 (1996); *In re Ames Dep't Stores, Inc. Stock Litig.*, 991 F.2d 953, 961-68 (2d Cir. 1993); *Competitive Associates, Inc. v. Laventhol, Krekstein, Horwath & Horwath*, 516 F.2d 811, 815 (2d Cir. 1975); *SEC v. Northern American Research & Dev. Corp.*, 424 F.2d 63, 78 (2d Cir. 1970); *Heit v. Weitzen*, 402 F.2d 909, 913 (2d Cir. 1968); *Greenfield v. Heublein, Inc.*, 742 F.2d 751, 756 (3d Cir. 1984); *Staffin v. Greenberg*, 672 F.2d 1196, 1204 (3d Cir. 1982); *Landy v. FDIC*, 486 F.2d 139, 168 (3d Cir. 1973); *SEC v. Rana Research*, 8 F.3d 1358, 1362 (9th Cir. 1993); *Wessel v. Buhler*, 437 F.2d 279 (9th Cir. 1971); *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 35 (D.C. Cir. 1987).

SEC filings.[4] That some of these precedents have considered not only the text, but also the policies underlying §10(b), is hardly a ground for granting certiorari, as this Court has long held that " 'in expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " *Dunn v. CFTC*, ___ U.S. ___, No. 95-1181, 1997 U.S. LEXIS 1451, at *22 (U.S. Feb. 25, 1997) (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)); *accord United States Nat'l Bank v. Independent Ins. Agents of America*, 508 U.S. 439, 454 (1993).

Thus, the first question presented by Ernst & Young would not warrant this Court's attention, even if this case involved, as Ernst & Young asserts, an outside auditor who *"does nothing more than provide an audit opinion to a client"* who then includes it in an SEC filing without the auditor's consent. Petition at i (emphasis added). But stating the question that way, it is based on false premises.

Ernst & Young suggests that auditors have no control over whether their certified financial statements are used in SEC filings: "It is the client who decides what information to make public; it is the client who determines the contents of the regulatory 10-K; and it is the client on

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[4] *See, e.g., In re JWP Inc. Sec. Litig.*, 928 F. Supp. 1239, 1251-52 (S.D.N.Y. 1996); *Adam v. Silicon Valley Bancshares*, 884 F. Supp. 1398, 1402 (N.D. Cal. 1995); *In re Leslie Fay Cos. Sec. Litig.*, 871 F. Supp. 686, 694-97 (S.D.N.Y. 1995); *Spear v. Ernst & Young*, [1994-1995 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶98,399, at 90,744 (D.S.C. 1994), *rev'd in part on other grounds sub. nom. Policy Management Sys. Corp. v. Ernst & Young*, No. 94-2254, 1995 U.S. App. LEXIS 25900 (4th Cir. Sept. 13, 1995).

whose behalf the 10-K is filed." Petition at 21-22. Ernst & Young emphasizes that "[a] Form 10-K is not a stock offering document, like a prospectus, nor does it specifically contemplate sales of securities, *like a registration statement*," Petition at 4 (emphasis added), conceding that "[a] plain reading [of §10(b)] may reach an accountant who provides false information for use in stock offering or promotional materials." Petition at 14.

Ernst & Young's assertions are doubly misleading. First, Ernst & Young plainly consented to and understood that its opinion would be included in a Form 10-K annual filing with the SEC – a document calculated to affect investor's opinions of CPC. Second, the Form 10-K in this case *was* incorporated by reference in registration statements for securities offerings. Ernst & Young *knew it would be, and consented in writing in the Form 10-K.* Indeed, page 84 of the Form 10-K *presents Ernst & Young's signed written consent to use of its false certification in these registration statements. See supra,* at 4.

"As *Central Bank* explained, '[a]ny person or entity, including a lawyer, *accountant*, or bank . . . may be liable as a primary violator under 10b-5. . . . ' " 16a (quoting *Central Bank*, 114 S. Ct. at 1455). An accountant who makes a statement calculated to reach the securities markets is such a person.[5]

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[5] Identifying no real issues or conflicts, Ernst & Young finally resorts to arguing that the result in this case is somehow "incongruous" with the result in *United States v. O'Hagan*, 92 F.3d 612 (8th Cir. 1996), *cert. granted*, ___ U.S. ___, 117 S. Ct. 759 (1997), where the Eighth Circuit rejected the "misappropriation theory" of insider trading. *O'Hagan* presents a genuine split in

B. Arguments Based On Legislative History Of §18's Reliance Requirement Provide No Basis For Review In A Case Where §18 And Reliance Are Not At Issue

Unable to identify any conflict with any precedent, Ernst & Young chides the Ninth Circuit not so much for deciding any question of law incorrectly, as for not reaching another question about another statute. It complains that the Ninth Circuit did not address its argument about the legislative history of §18 of the Exchange Act. Petition at 6.

There is no reason why this Court should review an opinion of the Ninth Circuit on an issue that Court did not address. The Ninth Circuit says nothing about what "actual reliance" is under §18 because it is not relevant. Plaintiffs have alleged no §18 claims, and Ernst & Young did not argue that plaintiffs' reliance allegations were insufficient for their §10(b) claims.

Ernst & Young did argue that any construction of §10(b) that allowed a false statement in an SEC filing to be deemed "in connection with the purchase or sale of any security" would turn §18 of the Exchange Act into "surplusage." The Ninth Circuit rejected *that* argument, observing that while the elements of claims under §10(b) and §18 may overlap in some cases, the fact that each has

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the circuits regarding the "misappropriation theory," an issue concededly not present in this case. *O'Hagan* has nothing to do with this case, where Ernst & Young both *made deceptive statements* to be included in SEC filings and has *abandoned* arguments that it must trade securities to be liable. *See* Petition at 19 ("Section 10(b) is not limited to active participants in the trading process. . . . ").

different elements and burdens of proof means that neither one makes the other "surplusage." 12a-13a; *accord Wachovia Bank & Trust Co., N.A. v. National Student Marketing Corp.*, 650 F.2d 342, 357 (D.C. Cir. 1980); *Ross v. A.H. Robins Co.*, 607 F.2d 545, 555-56 (2d Cir. 1979).[6] " 'The fact there may well be some overlap' " between §10(b) and other provisions of the securities laws " 'is neither unusual nor unfortunate.' " *Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983) (citation omitted). Indeed, "Congress rejected the notion that the express remedies of the securities laws would pre-empt all other rights of action." *Id.*

IV. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

March 4, 1997

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[6] 2a, 13a; *accord Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 296 (1993); *Magna Invs. Corp. v. Does*, 931 F.2d 38, 39 (11th Cir. 1991).

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